EXHIBIT 6
DATE 1/21/09
HB 40

TESTIMONY IN SUPPORT OF HOUSE BILL 40
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DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

Mr. Chairman and Members of the Committee, thank you for the opportunity to appear and present testimony in support of this important legislation. My name is John Tubbs, and I am the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation (Department). My Division is charged with implementing the Montana Water Use Act.

The Water Use Act was passed in 1973. Since its passage, one cannot obtain a water right (permit) or change an existing water right in Montana without completing the process set forth in the Act before the Department. The Water Use Act reflects the important protections and considerations of Article IX of the 1972 Montana Constitution. Specifically, these are the recognition and protection of existing water rights (pre-1973) while allowing for the appropriation of water for the use of the people of Montana.

The Legislation before you represents the most significant revision to the Water Use Act since its passage. The impetus for this legislation is the concern of members of the public participating in the process established by Act. As explained further below, the current structure of the Act allows the Department to express its views on the viability of an application for a permit or change in existing water right only at the conclusion of the administrative process. Applicants are frustrated to learn the Department's view that an application should be denied at the end of the process after substantial investment of time and resources. The Department is likewise frustrated by statutory constraints that limit its ability to advise applicants of its position earlier in the process. Key provisions of HB 40 allow the Department to advise applicants early in the process of its position as to whether an application should be granted or denied and also to allow for open and frank communication with applicants prior to making that decision. Importantly, the Bill also provides that the resources of current water right holders need not be expended until such time as it appears that an application for a permit or change meets the requisite criteria in the view of the Department.

CURRENT PROCESS

The current process is generally as follows. To obtain a water right or change an existing water right, an applicant must affirmatively prove to the Department the criteria in §85-2-311, MCA and §85-2-402 MCA, respectively, before a permit or change authorization will be granted. An applicant must file an application. An application is then reviewed by the Department to determine whether there is sufficient information for the application to move forward in processing, i.e. did the applicant provide sufficient information to warrant the Department's investment of time and resources to evaluate the application. This is known as the "correct and complete" determination under §85-2-302, MCA. If there is insufficient information to move forward and the applicant fails to provide sufficient information after notice, the application is terminated.

Once an application correct and complete, it must be noticed to the public. Others are given the opportunity to object to an application. §§85-2-308, -309, MCA. If valid objections are filed, the Department shall hold a hearing on the objections under the contested-case provisions (mini-trial) of the Montana Administrative Procedure Act (MAPA), Title 2, Chapter 4, Part 6, MCA. A Department hearing examiner is appointed to conduct the proceeding. After the hearing, the Department issues a final decision granting or denying the application. Decisions from the hearing examiner are subject to review in the district court under MAPA, Title 2, Chapter 4, Part 7, MCA. If there are no objections or if objections are resolved, the application is evaluated by the Department's Regional Office to which it was submitted for compliance with the applicable criteria. The Department then either grants the application or issues a statement of opinion under §85-2-310(3) explaining why it has denied the application. When objectors settle their objections with an applicant, the Department (either the Regional Office or the hearing examiner if other objectors remain) reviews the settlement conditions. The Department is not bound by the settlement but can accept those conditions that relate to making sure the criteria under §§85-2-311 and -402, MCA are met. Mont. Admin. R. 36.12.207. An applicant issued a statement of opinion may request a hearing before the Department as to why the Department's statement of opinion is in error. If no hearing is held, the statement of opinion becomes final. If a hearing is requested, it is held and a final decision by the Department is issued. This hearing is held as a show cause hearing before the Department where the applicant can present any relevant testimony and evidence as to why the statement of opinion is in error and the application should be granted. The final decision of the Department is then appealable to the district court just as a decision in a contested case with objectors.

In either case, the Department's position that an applicant has failed to prove the requisite criteria may not be known until an applicant has invested substantial resources in a contested case proceeding or in settlement with objectors. This bill proposes to remedy that situation.

PROPOSED PROCESS

The process proposed in this Bill is generally as follows. The process is the same through the correct and complete determination, with the exception that the Department notices all applications received on its website. After the application is determined correct and complete, the Department now has authority to meet informally with the applicant and others to have frank discussions about the merits of its application and possible conditions, if any, that might allow granting an application. The Department has 120 days after the correct and complete determination to issue a preliminary determination to grant or deny an application. This preliminary determination would contain findings of fact and conclusions of law to support the Department's determination. Only if the Department preliminarily determines that the applicant has proven the requisite criteria, is the application noticed to the public. The public notice would be as it is currently, except that it would also include a summary of the Department's preliminary determination. Persons could object to the application as in the current process. However, because the Department has already preliminarily determined

that the applicant has met his or her burden to prove the criteria, the Department would hold a show cause hearing with the objectors and the applicant under §2-4-604, MCA. In a show cause hearing, the objector has the burden of coming forward with evidence as to why the requisite criteria are not met or why certain conditions should apply. The applicant still maintains the ultimate burden of persuasion to prove the criteria under §§85-2-311 or -402, MCA, by a preponderance of the evidence. The process, as further explained in Department rules, would allow for discovery of party positions and evidence prior to the hearing. All parties could bring forward testimony, evidence, and argument relevant to the Department's decision. The Department's role is as decision-maker and is not a party to the case and does not appear as party at the hearing. The Department's files are public information and the basis for the Department's decision would be set forth in the preliminary determination. While the Department believes that a show cause hearing is warranted due to the preliminary determination already rendered by the Department, the Department does not oppose a contested case proceeding in this one context. The length of the hearing process is in great measure driven by agreement of the parties as to deadlines and submissions. After the hearing, the Department hearing examiner issues a final decision reviewable by a district court in the same manner as current decisions, Title 2, Chapter 4, Part 7, MCA.

If objections are unconditionally withdrawn, the application is granted. If objections are conditionally withdrawn, the Department may consider the conditions without hearing and grant the application with such conditions as the Department determines necessary to satisfy the requisite criteria. This is consistent with the Department's discretion to condition applications under §85-2-312, MCA.

If the Department's preliminary determination is to deny the application, the application is not noticed to the public. The Department would hold a show cause hearing under §2-4-604, MCA, for the applicant to show cause as to why the Department's decision is in error. The applicant could submit all evidence, testimony, and argument relevant to the Department's preliminary determination. One must remember that a preliminary determination to deny would be issued only after the Department and the applicant have had an opportunity to discuss the merits of the application and what conditions, if any, might allow an application to be granted. The Department's role is as decision-maker and it is not a party to the case and does not appear as party at the show cause hearing. The Department's files are public information and the basis for the Department's decision would be set forth in the preliminary determination. Upon the request of the applicant, the Department would have designated staff experts available at the hearing for questioning by the applicant. In a show cause hearing, the applicant has the burden of coming forward with evidence as to why the Department's preliminary determination is in error and the requisite criteria are met. The applicant retains the ultimate burden of persuasion to prove the criteria under §§85-2-311 or -402, MCA, by a preponderance of the evidence. After the hearing, the Department hearing examiner issues a final decision reviewable by a district court in the same manner as current decisions, Title 2, Chapter 4, Part 7, MCA. If the Department's preliminary determination to deny the application is reversed after the show cause hearing or by a

district court on review, the application would follow that process for the preliminary determination to grant.

The Department has 90 days to issue a final decision after the administrative record is closed in both cases (hearing on proposal to grant or deny). This is a departure from the timeline in §2-4-604, MCA, which requires a decision within 7 days, and is intended to replace that deadline. Particularly in the case of a show cause hearing on a preliminary determination to deny an application, the expansion of the time for a decision provides the Department with the flexibility to have a different hearing examiner decide the show cause hearing proceeding than the regional manager issuing the preliminary determination. Under the current process with the 7-day deadline under §2-4-604, MCA, the Department must assign the employee with the most knowledge of the case, regional manager, to hold the show cause hearing for a denial. Otherwise, there is insufficient time within the current statutory timeline for a new hearing examiner to assimilate all of the information and prepare a written decision.

Expiration of any timeline in the statute does not mandate issuance of the permit or change in authorization, but only that the Department makes the necessary decision. The Department retains discretion to determine whether the requisite criteria are proven by the applicant until the statutory process is complete, subject to judicial review under MAPA.

Finally, the Bill also clarifies the definition of "correct and complete" under §85-2-102(8), MCA. This clarification confirms the Department's long-standing interpretation that the term "correct and complete" means the threshold provision of sufficient information in an application for the Department to move forward to evaluate critically the information provided for proof of the requisite criteria. The clarification is intended to address the Montana Eighteenth Judicial District Court decision in Bostwick Properties v. DNRC, Docket No. DV-08-917AX (May 2008), where the District Court held that the "correct and complete" determination was a determination by the Department that the applicant had proven the requisite criteria, ultimately mandating issuance of the permit. The term is currently found in Title 85, MCA, in eleven statutes: 1) §85-2-102 (definitions); 2) §85-2-302 (permit application); 3) §85-2-306 (exceptions to permit requirements); 4) §85-2-307 (notice of permit and change application); 5) §85-2-308 (objections to applications); 6) §85-2-316 (water reservations by government entities); 7) §85-2-360 (ground water permit applications in closed basins); 8) §85-2-363 (combined applications in closed basins); 9) §85-2-402 (change applications); 10) §85-2-436 (instream flow applications by Department of Fish Wildlife and Parks); 11) §85-20-1401 (U.S. Forest Service Compact). The term needs to be clarified because the Department does not at the correct and complete stage weigh the evidence provided by an applicant against the Department's knowledge to determine if applicant has proven the requisite criteria.

ADVANTAGES OF THE PROCESS PROPOSED IN HB40

There are numerous advantages to the process proposed in this Bill, all of which save resources for the public and improve the agency's service to the public.

First, applicants and the Department can candidly discuss applications, evidence, and possible application conditions prior to Department decisions. Applications often fail for want of additional evidence or analysis that the applicant could but did not provide in the formal process.

Second, applicants are apprised of the Department's decision early in the process prior to expenditure of resources in a hearing or for settlement with objectors. Currently, applicants learn of the Department's position on the merits of the application at or near the end of the administrative process. Applicants are frustrated by the expenditure of resources to settle or participate in a hearing only to find that the Department does not believe that he or she has proven the criteria.

Third, the public need not expend resources on applications the Department does not believe should be granted. Presently potentially affected persons must object and participate in the process, not knowing whether the Department believes that the applicant has proven the criteria.

In conclusion, after great deliberation, the Water Policy Interim Committee agreed to move forward with this Bill to address the concerns that it heard from members of the public regarding the Department's permitting and change process. The Department fully supports this Bill and believes that it will improve the agency's service to the public and save public resources. Thank you again for opportunity to weigh in on this historic legislation.